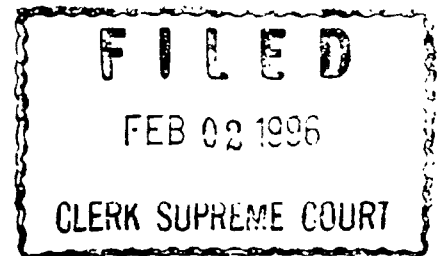


IN THE COURT OF APPEALS OF IOWA

No. 5-682 / 95-0567



IN RE THE MARRIAGE OF JANET NOBILING
AND MARK NOBILING

Upon the Petition of
JANET NOBILING,

Appellant/Cross-Appellee,

And Concerning
MARK NOBILING,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Greene County, Joel E. Swanson,
Judge.

Janet Nobiling appeals the child custody and economic provisions of the parties'
dissolution decree. **AFFIRMED AS MODIFIED.**

Mark J. Rasmussen of Horak & Rasmussen Law Offices, Jefferson, for
appellant.

A. Eric Neu of Neu, Minnich, Comito & Hall, P.C., Carroll, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

Janet and Mark Nobiling were married on February 19, 1977. They had five children together: Brandie, born October 29, 1977; Michael, born August 21, 1981; Sara, born July 3, 1983; Kirk, born July 6, 1987; and Katie, born December 30, 1991. The couple separated in 1994. They agreed the children would live with Janet pending the dissolution. Pursuant to separate agreements, however, temporary custody of Brandie and Michael was transferred to Mark before the dissolution hearing.

At the hearing, Janet testified Mark had been physically and emotionally abusive throughout the marriage. Mark denied being abusive to either Janet or the children. Evidence indicated Janet experienced difficulty understanding and controlling the children and the children were disruptive in her custody. Janet testified this disruptive behavior stemmed from Mark undermining her role with the children and belittling her by suggesting things to the children. The trial court, however, found no credible evidence to substantiate Janet's feelings. The evidence indicated all five children prefer to live on the "farm" where Mark lives. Furthermore, a custody evaluation, conducted by Ronald Hilliard upon Janet's motion, recommended custody be given to Mark.

The district court concurred with a custody evaluation recommendation and awarded the parties joint custody with physical care of the five children being awarded to Mark. The court found Janet's net monthly income to be \$1263.50 and, under the guidelines, she would be ordered to pay forty-five percent of her income as child

support. The court concluded such an award would be unjust and deviated downward. Janet was ordered to pay \$400 per month for the five minor children to be reduced \$80 as each child reached majority. The minimum visitation set for Janet included: every other weekend, three weeks in the summer, on Janet's birthday, part of each child's birthday, and alternating holidays. The court order did not specifically mention who would receive the dependent tax exemption.

With respect to the property distribution, the court awarded Mark the family homestead, which has a value of \$42,000 and debt of \$19,500. Mark was also awarded the farm machinery and grain on which indebtedness exceeded fair market value. Because Mark was awarded physical custody of the children, the court awarded him the set of encyclopedias, sewing machine, piano, and computer. Mark was ordered to assume all of the debts, except those Janet incurred since the separation. The court also ordered Mark to pay Janet \$10,000 in two yearly installments.

Janet appeals, and Mark cross-appeals.

I. Custody.

Our review in this matter is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not, however, bound by these determinations. *Id.* Prior cases have little precedential value, and we must base our decision primarily on

the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983)

In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration"--the court's determination of what will be in the long-term best interests of the child. *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985).

After full review of the record, we find the trial court correctly awarded physical custody of the five children to Mark. Mark is better able to provide for the long-term best interests of these children. The trial court found, and we agree, "Janet Nobling is unable to provide a stable environment for her minor children." Janet has actively interfered with the children talking on the telephone with their father and has shown a tendency to be unaccommodating in dealing with the father about visits. The children told Dr. Hilliard they were concerned, if their mother were the primary parent, she

might use her power in a manner detrimental to their needs and interests. Dr. Hilliard believed Janet has a tendency to make decisions which often jeopardize the children's emotional well being. "Mark, on the other hand, appears to have a good grasp of his role as a single parent. He has sought counseling, read material on single parenting and seems intent on preserving the relationship between his children and their mother." Dr. Hilliard finds Mark much more cooperative and believes Mark would manage the responsibility as primary parent in a manner more helpful to the children.

Janet claims Mark has been abusive throughout the marriage. The trial court, however, "found no credible evidence which would substantiate the Petitioner's thoughts" concerning the alleged abuse by Mark and his alleged attempts to undermine her role as a mother. We give considerable weight to this finding on credibility. Iowa R. App. P. 14(f)(7). In addition to the court's credibility findings, in the custody study, Dr. Hilliard stated Janet's allegations were difficult to substantiate. In fact, Dr. Hilliard stated there are more instances in which Janet has acted aggressively toward the children. Janet also claims Mark poses a risk for sexually abusing his children because Mark experimented sexually with his siblings when he was age 14 or 15. We believe these events are irrelevant, and expert testimony considered his exploration normal. One of Mark's sisters stated she does not believe Mark would behave in sexually inappropriate ways with his children, and Mark's extended family has never been

concerned about Mark being abusive to Janet. Furthermore, none of the children express concern about inappropriate sexual behavior within the family.

Evidence also indicates the children prefer to be with their father. According to the custody study, both Brandie and Mark expressed a strong preference to live with Mark and, since arrangements were modified so they could live with him, neither child has chosen to utilize visitation with their mother with any frequency. The children have consistently rated Mark higher than Janet in the areas of overall competency as a parent, emotional supportiveness, behavioral consistency, and the possession of admirable character traits. The four oldest children view their father as more able to identify their needs and feelings, to sacrifice personal needs to benefit the children, to follow through on commitments and promises, and to control temper. The children describe their father as a peaceful man who would withdraw in the face of Janet's attacks rather than react aggressively. On the other hand, the two oldest children believe their mother is self-centered and engages in "dirty tricks" in order to control a situation.

For the above stated reasons, we determine the best interests of the children are better served by granting physical custody to Mark.

II. Child Support.

It is well established that parents have a legal obligation to support their children. *In re Marriage of Fleener*, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to

contribute. *In re Marriage of Bornstein*, 359 N.W.2d 500, 504 (Iowa App. 1984). The factors to consider are: the financial resources of the child; the financial resources of both parents; the standard of living the child would have enjoyed had there not been a dissolution; the cost of day-care; the physical and emotional health needs of the child; and the child's educational needs. Iowa Code § 598.21(4) (1991).

In Iowa there is a rebuttable presumption the amount of child support which would result from the application of the child support guidelines is the correct amount of child support to be awarded by the court. *State ex rel. Nielson v. Nielson*, 521 N.W.2d 735, 737 (Iowa 1994). The court may adjust the amount to provide for the children's needs and to do justice between the parties. *Id.* However, the court has no authority to vary from the guidelines without a written finding the guideline amount would be unjust or inappropriate under the criteria contained in the guidelines. *Id.* Deviation from the uniform application of the guidelines is discouraged. *State ex rel. Schaaf v. Jones*, 515 N.W.2d 568, 570 (Iowa App. 1994). In the absence of special circumstances, the reasonable living expenses of the noncustodial parent do not provide a ground for departing from the guidelines because the guidelines already take into account the reasonable living expenses of the noncustodial parent. *Id.*; *State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 691 (Iowa 1993). However, we have approved a downward adjustment when necessary to do justice under the special circumstances of the case. See *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 105 (Iowa 1994).

We find the circumstances of this case do not warrant deviating from the guidelines as done by the district court. The district court stated,

The Court generally is directed to apply the Supreme Court Guidelines in determining child support. Based upon the net monthly incomes of Janet and Mark, Janet would be required to pay 45 percent of her net monthly income as support. Based on her total net monthly income and the requirement of supporting herself, the Court finds that the Guideline amount would be inappropriate and unjust.

As stated above, the reasonable living expenses of the noncustodial parent do not provide a ground for departing from the guidelines. *State ex rel. Schaaf*, 515 N.W.2d at 570. Furthermore, Janet did not file a reply brief explaining any special circumstances justifying the court's decision to deviate from the guidelines. After review of the entire record, we can find no circumstances warranting a downward adjustment. Therefore, we reverse and remand to the district court for entry of an order consistent with the child support guidelines.

III. Visitation.

When Janet had custody of the children during the pendency of the action, Mark had the opportunity to have weekday visitation with the children. When custody was given to **Mark**, however, the district court did not grant weekday visitation to Janet. Liberal visitation rights are in the children's best interest. Iowa Code § 598.41(1) (1991); *In re Marriage of Muell*, 408 N.W.2d 774, 777 (Iowa App. 1987). Unless visitation with the noncustodial parent will in some way injure the children, visitation is not to be prohibited. *In re Riddle*, 500 N.W.2d 718, 720 (Iowa App. 1993). In this

case, there is no showing Janet is any danger to her children. Furthermore, in testimony, neither party objected to weekday visitation by the other party. In fact, Mark stated it "wouldn't hurt" for Janet to have this same type of visitation as he enjoyed when Janet had custody. As such, we determine it is in the best interests of the children for Janet to be granted midweek visitation on Wednesday evenings or another mutually agreed upon weekday.

IV. Real and Personal Property.

The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). We reject precise percentage divisions because "[t]he question is always what is an equitable and just award in a given set of circumstances." *In re Marriage of Cooper*, 225 N.W.2d 915, 919 (Iowa 1975).

Both parties argue the division of the property was inequitable. Mark received the family farm with fair market value of \$42,000 and debt of \$19,452.86 for equity of \$22,547.14. Mark received farm machinery and grain with debt exceeding fair market value. Mark was order to pay \$10,000 to Janet in two yearly installments. We

determine the court's distribution was equitable under the circumstances of this case. With respect to personal property, Janet argues certain personal property, including a piano and computer, should have been awarded to her. As the district court indicated, these items of personal property should follow the children. Since Mark has been awarded primary physical custody of the children, the district court correctly awarded both the piano and the computer to him.

V. Tax Exemption.

The general rule is that the custodial parent is allowed to claim the exemption. I.R.C. § 152(e)(1) (1988). The custodial parent is treated as having furnished over half of the child's support. *Id.*

There are three exceptions to the rule that a custodial parent is entitled to the dependency exemption: (1) when there is a multiple support agreement that allows the child to be claimed as a dependent by a taxpayer other than the custodial parent; (2) when the custodial parent releases his or her right to the child's dependency exemption to the noncustodial parent by executing IRS Form 8332; and (3) when a pre-1985 divorce decree or separation agreement between the parents grants the exemption to the noncustodial parent and the noncustodial parent provides at least \$600 for the support of the child for the year in question.

I.R.C. § 152(e)(2), (3), and (4) (1988). Because Mark is the custodial parent and none of the above exceptions are present in this case, we determine Mark is entitled to the tax exemption for all five children.

VI. Attorney Fees and Costs.

Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. *In re Marriage of Morehead*, 224 N.W.2d 242, 245

(Iowa 1974). An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). To overturn an award the complaining party must show the trial court abused its discretion. *In re Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). Awards of attorney fees must be fair and reasonable amounts. *In re Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *In re Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). We determine the trial court did not abuse its discretion in its assessment of the court costs and attorney fees. As such, the costs of this action will be shared equally, and each party shall be responsible for his or her own attorney fees.

AFFIRMED AS MODIFIED.